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THE STATE OF NEW HAMPSHIRE

SUPREME COURT

In Case No. 2021-0132, Richard A. Waite v. Northern New Hampshire Correctional Facility, the court on May 28, 2021, issued the following order:

Notice of appeal is declined. See Rule 7(1)(B).

Under Supreme Court Rule 7(1)(B), the supreme court may decline to accept a notice of discretionary appeal from the superior or circuit court. No appeal, however, is declined except by unanimous vote of the court with at least three justices participating.

This matter was considered by each justice whose name appears below. If any justice who considered this matter believed the appeal should have been accepted, this case would have been accepted and scheduled for briefing.

Declined.

Hicks, Bassett, Hantz Marconi, and Donovan, JJ., concurred.

**Timothy A. Gudas,
Clerk**

Distribution:

Cheshire County Superior Court, 213-2020-CV-00191

Honorable David W. Ruoff

✓ Mr. Richard Waite

Attorney General

File

**THE STATE OF NEW HAMPSHIRE
JUDICIAL BRANCH
SUPERIOR COURT**

Cheshire Superior Court
33 Winter Street, Suite 2
Keene NH 03431

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TTY/TDD Relay: (800) 735-2964
<http://www.courts.state.nh.us>

NOTICE OF DECISION

**Richard A Waite
NHSP # 91955
138 East Milan Road
Berlin NH 03570**

*Rec'd
16-MAR-21
9:50pm*

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Case Name: **Richard A Waite v Northern NH Correctional Facility**
Case Number: **213-2020-CV-00191**

Enclosed please find a copy of the court's order of March 10, 2021 relative to:

Ruling on Motion to Dismiss

March 12, 2021

Daniel J. Swegart
Clerk of Court

(555)

C:

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taken under advisement, Mr. Waite is given another 45 days to respond. DWR

THE STATE OF NEW HAMPSHIRE

CHESHIRE, SS.

SUPERIOR COURT

DOCKET NUMBER:213-2020-CV-00191

STATE OF NEW HAMPSHIRE

v.

RICHARD WAITE

**STATE'S OBJECTION TO MOTION FOR SUMMARY JUDGMENT AND
STATE'S MOTION TO DISMISS FOR LACK OF JURISDICTION**

NOW COMES the State of New Hampshire, by and through the Office of the Cheshire County Attorney, and submits this **Objection and Counter Motion**. In support of this Motion, the State asserts:

1. The Defendant was convicted of numerous Aggravated Felonious Sexual Assault and related charges and sentenced on April 01, 2016 to a total of 45-life, stand committed and several suspended sentences.
2. He appealed the verdict to the New Hampshire Supreme Court where he was represented by attorney Thomas Barnard of the Public Defender's Office, Appellate Division (Barnard). He lost that appeal. He, contemporaneously with the first appeal, filed a *pro se* appeal for ineffective assistance of counsel on his trial attorney Matthew Hill, also of the Public Defender's Office (Hill). That appeal was not accepted by the New Hampshire Supreme Court.
3. The Defendant has filed a Motion For Summary Judgment with the argument that there can be no debate over the existing facts of the current *Habeas*. The State disagrees. It disagrees that there are no issues of fact. It also disagrees that the Defendant accurately states the applicable law in regards to the representation of Thomas Barnard (Barnard) of the Public Defender's Office.
2. The mere fact that there exists a material disagreement about factual issues is sufficient to deny the Motion for Summary Judgment at this point.

However, below the State will also illustrate the fundamental misrepresentation from the Defendant in regards to the applicable law on Public Defender representation when there is a concurrent claim of Ineffective Assistance of Counsel of a Public Defender.

Misrepresentation of the Full Holding of *Veale*

3. The defendant cites *State v. Veale*, 154. N.H. 730 (2007) as basis for arguing that the Public Defender's Office divisions of Trial counsel (Trial Defender) and Appellate Divisions (Appellate Defender) are considered one firm and are, therefore, barred from representing Defendants when a conflict exists. The Defendant then ceases to reference *Veale*, either through as dishonest representation to the Court or because he fails to understand the full holding.

4. *Veale* dealt with a very similar issue to the one facing the Defendant and is directly on point to the entire basis for the current *Habeas*. In *Veale*, as in the current case, the appellant was represented by the Public Defender's Office at Superior Court (in his case a competency hearing). After that issue was resolved, the appellant pursued an Ineffective Assistance of Counsel claim against the public Defender who initially represented him. His case on appeal was initially assigned to the Public Defender Appellate program. That program initially claimed that this was a conflict and the issue was presented to the Supreme Court to determine if the Public Defender's Office could handle the appeal if there was a concurrent Ineffective assistance of Counsel claim against another Public Defender.

5. The Defendant here is correct that the Court did rule that the two divisions of the Public Defender's program do represent a single office but the analysis did not stop there. The Court ultimately ruled that the Appellate Defender is not barred from representing a defendant in such an instance, however, if an Ineffective claim is appealed, the other claims are stayed pending the resolution of that issue.

Under this Hybrid approach, if, on appeal, a defendant has raised a claim of ineffective assistance against a public defender and the appellate defender has been appointed as appellate counsel, the appeal will, absent special circumstances, be stayed. This stay shall be automatic and shall take effect without regards to the

merits of the ineffective claim. In this way, raising a claim of ineffective assistance will act as a *per se* bar, at least temporarily, to continuing representation by the appellate defender.

Following the imposition of the stay, a defendant's ineffective assistance claim will be adjudicated on its merits in superior court. Thus, a claim of ineffective assistance of counsel will maintain its proper place of collateral review, and will not prematurely merge with the Defendant's claim on direct appeal. Citation omitted. Once the trial court has rendered a decision, the defendant may, if necessary, resume litigation of his original appeal with the aid of the appellate defender or independent counsel, whichever is required under the circumstances of the case.

State v. Veale, N.H. 736.

6. The Court then stayed the case and remanded it to the superior court for judgment, however, the appellate defender remained the counsel of record for the appeal. *Id.*, at 737.

7. The current case is indistinguishable. The only conflict in this case was the allegation of ineffective assistance against the Trial Defender. That issue of ineffective assistance was started to be litigated soon after the Appellate Defender received the case. See timelines in paragraph #8, below. Further, it is believed that the Appellate Defender, upon notice that the Defendant was appealing that ruling, further stayed their work on the case as required by *Veale*.¹ So, despite the Defendant's claims to the contrary, that the Public Defender is always barred from representing him on appeal, the very case he cites and relies on argues the opposite. The Appellate Defender is barred while the ineffective issue is pending but may be counsel on appeal once that is resolved. Again, this was the very procedure followed by the Appellate Defender.

8. The specific timelines of this case are as follow: A. 2015-Waite convicted by a Cheshire County Jury; B. 2016-Waite files a motion for new trial and motion of ineffective assistance *pro se*; Cheshire Superior court denies both motions in late 2016; C. 2017-Waite *pro se* appeal of the denial of the

¹ The State says believes because it has no access to the Appellate Defender file as that remains confidential at this point. See accompanying Motion to deem privilege waived. Another reason why the Summary Judgment is untimely.

Ineffective claim directly to the Supreme Court and it is denied late that year;
D. 2018- Supreme Court denies direct appeal where Waite was represented by the Appellate Defender.

The Habeas Should Be Dismissed as Procedurally Barred

8. The Defendant had recently pursued a *Habeas* alleging the majority of the very same issues that were not accepted on appeal by the Supreme Court. This Honorable Court recently dismissed that *Habeas* based upon a procedural bar, namely that the Defendant was barred from re-litigating the same issues as previously decided and that the few new issues that were raised were barred as they were well known by the Defendant and not raised on appeal. See Decision of December 14, 2020 in 213-2014-CR-00223, particularly page 4.

9. Just like the issues raised in the ineffective assistance *Habeas*, the Defendant was well aware of this potential issue when he filed his appeal. See Defendant's Motion for Summary Judgment, page 2 (citing attorney Dowd indicating a conflict with the Public Defender Office; the Defendant "repeatedly" raising the issue with attorney Barnard (his Appellate Defender); and the Appellate Defender refusing to raise the issue with the Supreme Court.

10. The above, and further statements of the Defendant throughout the Motion, certainly indicate that he believed that this representation was an issue. Instead of filing an appeal on the issue, he remained silent and allowed attorney Barnard to argue his appeal at the Supreme Court. Now, that the appeal was fully denied, he seeks to collaterally attack a process he allowed to continue because he is unhappy with the results. It should be noted that there has been zero argument that Barnard's representation at the appeal was somehow ineffective, rather it is just that he represented him at all.

11. The Defendant may argue that he did attempt to notify the Court of the issue but was unsuccessful. That argument should be given very little weight. He certainly knew how to file an appeal on his own as his Motion for Ineffective Assistance was submitted through his own actions, both at the superior and supreme court levels. In fact, that Motion was filed and denied well before the argument on his direct appeal. To argue he was simply stuck with Barnard flies in the face of his own actions and the record before this Court. See timelines in paragraph #8. That timeline shows that he filed an

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ineffective assistance claim directly to the Supreme Court while represented by the Appellate Defender. He certainly knew how to bring this issue to the Court's attention and intentionally failed to do so.

12. The State would rely upon the reasoning and authorities cited by this Honorable Court in its December, 2020 decision in docket number 213-2014-CR-00223 to rule that this particular argument of conflict with the Appellate Defender should be barred and dismissed.

WHEREFORE, the State respectfully requests that this Court:

- A. Deny The Motion For Summary Judgment;
- B. Dismiss the *Habeas* claim against Barnard and the Appellate Defender;
- C. Allow an extended response time as the Defendant is currently incarcerated; and
- D. Grant such other and further relief as this Court deems equitable and just.

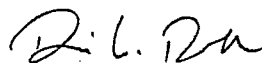
Respectfully Submitted,
STATE OF NEW HAMPSHIRE

/s/_____
Keith W. Clouatre
Assistant County Attorney
Bar number 14883

I certify that a copy of this motion has been forwarded the defendant at Richard Waite, #91955, Northern N.H. Correctional Facility, 138 East Milan Road, Berlin, NH 03570 on December 28, 2020.

/s/_____
Keith W. Clouatre

Upon review of all the pleadings, the Court concurs with the State's analysis. The Motion to dismiss is granted.


Honorable David W. Ruoff
March 10, 2021

Clerk's Notice of Decision
Document Sent to Parties
on 03/12/2021